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EXTRAIT

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ROMAN LAW, FORENSIC ARGUMENT AND
THE FORMATION OF CHRISTIAN ORTHODOXY
(III-VI CENTURIES)

*Droit romain, argumentation juridique
et formation de l'orthodoxie chrétienne (III^e-VI^e siècle)*

Avant la conversion de Constantin, au début du IV^e siècle après J.-C., le droit romain ne prévoyait pas la possibilité de poursuites judiciaires pour « croyance erronée ». L'introduction de cette notion dans la sphère du droit romain entraîna la catégorisation et la systématisation par la loi de la croyance religieuse en tant que telle. Il fallait classer et nommer les hérétiques avant de pouvoir les poursuivre.

Dans le présent article, nous nous proposons d'identifier deux stratégies que l'on adopta dans les poursuites judiciaires pour croyance « hérétique » : d'une part l'appel au précédent, c'est-à-dire l'extension des classifications déjà existantes du droit romain pour englober la catégorie nouvelle de « sectes hérétiques » ; d'autre part la définition légale d'un corps de « croyances orthodoxes ». Nous soutenons que chacune de ces stratégies avait des limites. Par nécessité, les définitions furent élaborées cas par cas, au fur et à mesure que l'on identifiait de nouvelles hérésies. Par la suite, on mit ces définitions à l'épreuve en les appliquant dans des affaires concrètes portées devant les tribunaux.

Des techniques juridiques comme la classification, la catégorisation et le raisonnement par analogie constituent donc des outils essentiels pour les légistes tant ecclésiastiques que laïcs qui cherchent à faire appliquer la législation contre les hérétiques. Devant les tribunaux, on assiste à une cristallisation des questions de doctrine, au fur et à mesure que l'on exige de la part de ceux qui se trouvent accusés d'hérésie une justification de leur position théologique. La doctrine chrétienne fut ainsi mise à l'épreuve, ce qui contribua à la fois à son exposition et à son extension. Qui plus est, le jugement définitif prononcé à la fin de l'affaire en fournit une résolution légale dont on peut se réclamer dans des querelles doctrinales ultérieures. Nous concluons que, de cette manière, l'argumentation légale représente un mécanisme capital permettant de répondre au besoin exprimé d'une orthodoxie chrétienne unique.

Human laws invalidate all litigious cases within thirty years. Is Christ made a subject of litigation some five hundred years after his birth? Does he endure controversies about his origin and bear investigations about his legal status? O, heretic, cease to judge your judge.

PETER CHRYSOLOGUS¹

In the quotation given above Peter Chrysologus makes a rhetorical appeal to a rule of Roman law in order to silence heretical argumentation. Within the post-Constantinian church, however, appeals to the authority of Roman law were more than mere rhetoric. From the first century onwards the Christian church developed internal ecclesiastical procedures in order to sentence baptised believers who strayed from the flock. However, wrong religious belief only existed as a potential civil or criminal charge under Roman law after Constantine incorporated Christianity into the structure of Empire. Proscriptions against heretical religious practice and public prosecutions for wrong belief were legal innovations.

Between the fourth and sixth centuries a vast body of anti-heretical legislation was issued by the imperial authorities, far outnumbering the surviving laws against paganism. Theology interacted with Roman law, defining and categorising heretical groups and establishing penalties which covered both this life and the next. However, Imperial legislation could be transformed by applying it to particular cases. This process of stretching law creatively, through applying it in practice, was of crucial importance to the post-Constantinian church. From the first decades of the fourth century Roman law needed to be extended to cover a whole new situation of fact: a Christian empire. In the particular case of heresy, new legal categories were developed case-by-case. Moreover, the forensic practitioners responsible for creating these new legal categories operated from within the church. Key late Roman bishops had themselves received training in forensic rhetoric and in some cases had practised as advocates and legal experts before their conversion. Where there is an account of a court case against someone accused of heresy you also find a bishop either aiding the prosecution, or constructing the defence.

Previous scholarship on heresy in late antiquity has sought to trace the development of Christian doctrine through focusing upon the struggles for authority between orthodox and heretical groups

within the church. Detailed research undertaken by historians and theologians on the formation of orthodoxy has revealed the fluidity and innovative nature of theological doctrine in this period. The conclusions to these modern studies have stressed the fact that to view orthodoxy as a body of belief waiting to be challenged by heretical opinions is to misunderstand the dynamics behind theological development. Defining who was and who was not orthodox was no easy matter, either for the church or for the Imperial authorities.

The categorisation of beliefs as orthodox, and the very words used to express those beliefs, were created out of debate. Before Arius began to question the relations between the three parts of the Holy Trinity there was no need for the famous homoousian formula that Constantine suggested to the council of Nicaea in 325. The Nicene creed was carefully worded in an attempt to exclude Arius' interpretation, but the Arian party did not accept that right belief had been established. The issue of authority was therefore raised; the resolution of what was to be accepted as orthodox and what was to be classed as heretical could not be decided by theological argumentation alone.

Less than a year after the Council of Nicaea Constantine used his authority as Roman Emperor and condemned the Arians in a legally binding rescript. Thus Imperial law is revealed as an important mechanism by which issues of authority could be resolved within the church. However, modern scholars have privileged the authoritative position of these laws by concentrating on what they prescribed rather than the way in which they were generated and used in practice.

The work of specialist legal historians on heresy in the late Empire has focused almost exclusively on the Imperial legislation contained in Book Sixteen of the Theodosian Code, in some cases relating it to more general studies on the personal beliefs and corresponding religious policies of successive emperors. The monograph by L. De Giovanni, *Chiesa e Stato nel Codice Teodosiano. Saggio sul Libro XVI*², traces the individual constitutions back to the circumstances which prompted their being drafted. This is an important exercise, as the codification of these laws by Theodosius in 438 creates the impression that they originated solely from the Emperors' desire to legislate. Many were in fact Imperial responses to petitions from ecclesiastical authorities and requests from magistrates who had experienced difficulties in applying the existing

¹ *Sermo*, 145, in *Patrologia latina*, 52, c. 245.

² Naples, 1980.

laws in their courts. In 395 Aurelianus, the proconsul of Asia, was faced with the task of presiding over a prosecution for heresy. He was obviously at a loss as to whether to classify the Luciferian bishop Heuresius as Catholic or not, so he addressed an appeal for clarification to the Emperors. The Imperial response is the constitution preserved in Theodosian Code 16.5.28:

Those persons who may be discovered to deviate, even in a minor point of doctrine, from the tenets and path of the Catholic religion are included under the designation of heretics and must be subject to the sanctions which have been issued against them.

Heuresius was thus a heretic, but a high degree of theological skill had to be employed in order to classify him as such.

Book Sixteen, Title Five of the Theodosian Code, *De haereticis*, details a bewildering array of heresies and their corresponding penalties. Neither the heresies condemned nor the sanctions against them remained constant. Virtually no historical studies have sought to investigate how individual prosecutions were undertaken on the basis of these laws, nor how defences were constructed in order to avoid their harsh penalties. Yet the primary sources demonstrate that in the late Roman atmosphere of developing theological principles and shifting Imperial legislation there was plenty of scope for the traditional activities of wily advocates and able *iurisperiti*. Within this forensic context advocates, *iurisconsulti* and *iudices* (both secular and ecclesiastical) played an important role in developing new theological/legal classifications.

HERESY LAW: INNOVATION OR TRANSFORMATION?

The legal categories of pagan, heretic, schismatic and apostate were post-Constantinian innovations. Does this mean that, after Constantine, legislators and legal practitioners started from a clean slate and invented new types of criminal and civil offences? The potential to define wrong religious belief as a civil or criminal charge under Roman law only existed after Constantine had incorporated Christianity into the structure of Empire. However, as Mommsen first argued, offences against religious *pietas* were recognised under the late Republic and early Empire³. This fact must be qualified by the *caveat* that religious delicts *per se* were unknown to classical Roman law: "Les infractions que le Romain pouvait commettre dans sa pratique cultuelle sont toutes matérielles

³ T. Mommsen, *Der Religionsfrevel nach römischen Recht*, in *Gesammelte Schriften*, 3, Berlin, 1890, p. 397.

et extérieures. Est pieux celui qui est matériellement pur et respecte à la lettre les prescriptions rituelles générales. Aucun sentiment intime n'est requis [...]. La faute théologique proprement dite de l'individu n'intéresse pas la *civitas*, la catégorie du délit religieux en soi est inconnue du droit romain"⁴.

The repression of the Bacchanalia (186BC), the cult of Isis (from 58BC), the expulsion of Jews from the city of Rome (139BC and 19 AD) and the various persecutions against astrologers (*mathematici*), magicians (*magi*) and Christianity itself should be seen in the same context. These practices and cults were defined as *superstitiones*, and in this respect Festus' definition of *religiosi* is instructive:

They are called religious who have chosen to fulfill or pass over religious observances in accordance with the custom of the state and who do not involve themselves with alien cults (*superstitiones*)⁵.

As Scheid argues none of these *superstitiones* committed "les crimes contre la religion":

Ces délits étaient perçus comme des crimes de droit commun ou comme des atteintes à l'ordre public. Il ne pouvait s'agir de délits religieux puisque la vie religieuse n'était pas en cause, et que par conséquent la communauté religieuse n'était pas engagée. La pratique exclusive d'une superstition constituait un crime contre la société et l'État, et non pas un crime contre la religion⁶.

The prosecution of illicit religious behaviour was thus achieved under the rubrics of various criminal laws already in existence. Constantine incorporated Christianity into the framework of Empire on the same basis as the pagan state cults, and the prosecution of illicit Christian behaviour was undertaken through appeals to the same rubrics of criminal law. Heresy was defined as a *crimen publicum*⁷. The defence of the *sacrosancta ecclesia catholica* was identified with the defence of the Empire itself: legislation was issued «*pro salute communi, hoc est pro utilitatibus catholicae sacrosanctae ecclesiae*»⁸. Canon law sanctioned appeals to Roman law within this context. Canon 12 of the Church Council of Antioch (341) clearly states that a schismatic cleric who persists in his dissension should be prosecuted under the charge of sedition by the Roman authorities:

⁴ J. Scheid, *Le délit religieux dans la Rome tardo-républicaine*, in *Le délit religieux dans la cité antique*, Rome, 1981 (Collection de l'École française de Rome, 48), p. 130.

⁵ Festus, S.v. *Religiosi* (quoted from A. Watson, *The State, Law and Religion: Pagan Rome*, Athens-London, 1992, p. 60).

⁶ J. Scheid, *Le délit religieux* cit., p. 166.

⁷ CTh 16.5.40,1 (407).

⁸ CTh 16.5.47 (409).

A presbyter or deacon who separates himself from the Church and gathers a private assembly and when summoned by the bishop refuses to be persuaded and will not obey even after a second summon, must be deposed with no further remedy, and if he persists in troubling and disturbing the church let him be corrected as a seditious person by the civil power⁹.

Ecclesiastical schism could thus be prosecuted under the charge of sedition. Christianity was thereby defended from seditious persons for the same reason as the practices of traditional Roman religion had equally been defended. Christian right practice, however, also presupposed right belief:

That the right form of worship is essential if heaven is to be propitious is an axiom of ancient society [...]. The Christians introduced an even greater passion into the matter by their belief that right worship also presupposed right doctrine, and that therefore heresy or schism would, if long tolerated or regarded as a matter of indifference, provoke the wrath of the Lord¹⁰.

The idea that right belief should fall within the legislative sphere was thus an innovation. But the juridical basis for the prosecution of deviant belief was also provided for using the legal terminology of the past. Heresy was a *sacrilegium*¹¹; a *criminosa religio*¹²; a *perfidia*¹³; and a *nefaria superstitio*¹⁴. And it was punishable under already defined penalties¹⁵. An important precedent was provided by subsuming heretical sects under the prohibitions already established against astrologers and the practitioners of magic arts who had variously been defined as a threat to the Roman order – I shall return to this point in detail below. Thus the capacity to prosecute heretics was not a result of pure innovation, but of

⁹ See also CTh 16.4.1 (386). A comparison can be made with canon 18 of the council of Chalcedon (451): "The crime of conspiracy or banding together is utterly prohibited even by the secular law and much more ought it to be forbidden in the Church of God".

¹⁰ H. Chadwick, *The Role of the Christian Bishop in Ancient Society*, in *Protocol of the 35th Colloquy* [Centre for Hermeneutical Studies], Berkeley, 1980, p. 10.

¹¹ For example CTh 16.2.25 (380). See also CTh 16.5.8 (381); 16.5.29 (395) and 16.5.63 (425).

¹² CTh 16.5.13 (384).

¹³ CTh 16.5.37 (405) and 16.5.63 (425).

¹⁴ CTh 16.5.48 (410).

¹⁵ Discussed in detail by R. Maceratini, *Ricerche sullo status giuridico dell'eretico nel diritto romano-cristiano e nel diritto canonico classico (da Graziano ad Ugucione)*, Milan, 1994, p. 74-81 and p. 81-96.

transformation. Late Roman law created new practical solutions, when the previous rules would not fit, by arguing out from the old rules.

The innovative introduction of the idea of wrong belief into the Roman legislative sphere necessitated the legal categorisation and systematisation of religious belief itself. Heretics had to be grouped and named if they were to be prosecuted. Definitions were thus elaborated case by case, as new heresies were identified and classified within the ecclesiastical sphere. As a body of anti-heretical legislation developed in the course of the fourth and fifth centuries, new sects were named and subsumed under heretical categories that had already been outlawed. New heresies were defined by reference to a heresy already recognised under Roman law. I shall provide concrete examples of this activity in the section below. This casuistic development of heresy law throughout the fourth and fifth centuries provides a case study for how late Roman law evolved in general. We are far from a decadent system with sub-standard practitioners operating in a state of decline and fall. Prosecuting heretics required ingenuity, creative reasoning and a system of effective functioning courts.

HOW TO PROSECUTE A HERETIC: THE USE OF LEGAL PRECEDENT

In 276 AD Mani was executed under the orders of the Sassanian King Bahram on the charge of having provoked apostasies from Zoroastrianism. However, the origin of Mani's kerygma lay in his own apostasy from a sect of Jewish-Christian baptists in Babylonia. As Peter Brown has argued:

The Manichees entered the Roman Empire, not as a final version of the *Mages hellénisés* but at the behest of a man who claimed to be an Apostle of Jesus Christ: they intended to supersede Christianity [...]. [Mani] looks back to the Gnostic Christianity of Osroene: his dialogue is with Marcion and Bardasian of Edessa; Zoroaster is a distant figure to him¹⁶.

Whilst accepting Brown's caveat, it should be noted that Mani's theological system did appeal to a cosmic dualism outlined in both Gnostic apocrypha and occult texts. More particularly, Mani based his theological system on precise concepts about the movements of the sun, moon and stars. However, Christian theologians before Mani had already proposed a relationship between Christian heresy,

¹⁶ P. Brown, *The Diffusion of Manichaeism in the Roman Empire*, in *Journal of Roman Studies*, 59, 1969, p. 93.

magic and astrological practice¹⁷. From its inception Manichaeism was classified by both non-Christians and Christians as a heretical Christian sect.

The pagan Neo-platonist Alexander of Lycopolis, writing c. 300 AD, framed his *Critique of the Doctrines of Manichaeus* as a philosophical investigation into Christian belief. Alexander's opening line reads: "The philosophy of the Christians is a simple philosophy". He continues:

Since this simple philosophy has been split up into numerous factions by its later adherents, the number of issues has increased just as in sophistry, with the result that some of these men became even more skilful and, so to speak, more prone to creating issues than others [...]. An example of this tendency is the man named Manichaeus, whose astonishing doctrines, in my opinion, far surpass those of all the others. This innovation of his has but recently come to the fore¹⁸.

Not long after Alexander completed his treatise, an encyclical letter was written from the Bishop of Alexandria to all the churches of the East, containing a formal denunciation of Manichees as Christian heretics. In the same year (probably 302, though some scholars favour 297) the Emperors Diocletian and Maximianus issued the first Roman legal prohibition against the sect of the Manichees. Drafted less than a year before Christianity itself became a persecuted religion again, the Diocletianic constitution classified Manichees according to an already existing legal category: Manichaeism was outlawed as one of a class (*genus*) of *maleficia*¹⁹.

The text of the anti-Manichaean rescript (which I shall examine below) was subsumed under the titles *de maleficiis* and *de mathematicis* by both contemporary and later legal collections. By incorporating the Manichees into already established categories of criminal practice, the condemnations for each became fused together. Under the Christian emperors Manichaeism was legally categorised as a Christian heresy; however prosecutions against Manichees were undertaken on the basis of their earlier classification as *mathematici* and *malefici*. The punishments for Manichees as heretics were thus already determined. By the late fourth century this process of classification undertook a new twist,

with new Christian heresies being subsumed under the category of Manichaeism. Classification and re-classification are thus revealed as important techniques through which innovations in imperial legislation could be presented as reasonings out from the past.

The constitution of Diocletian and Maximianus is in fact a rescript addressed to Julian, Proconsul of Africa²⁰. In the first section of the text the Emperors outline a general justification for the outlawing of Manichees: their sect is condemned as a "new and unexpected monstrous-birth from Persia", as a barbarous *superstitio* practised by individuals who threatened the peaceful observances of the *religiosi* upon which the health of the empire itself depended²¹. However, to enable actual prosecutions against Manichaeism itself, the 302 rescript does not create a new category of offence but classifies Manichaeism in the class of *maleficia*. The Emperors acknowledge that the inspiration behind this classification was provided from the original *relatio* drafted by the proconsul Julian:

*Et quia omnia, quae pandit prudentia tua in relatione religionis illorum, genera maleficiorum statutis evidentissime sunt exquisita et inventa commenta, ideo aerumnas atque poenas debitas et condignas illis statuimus*²².

From this passage we can surmise that Julian had already encountered Manichees before his proconsular court – the account that they gave of their Manichaean beliefs and practices may well have prompted Julian's categorisation of them as a type of *maleficia*. In any event, Julian was uncertain about how to proceed against Manichaeism and looked to the Emperors for guidance. In response, the Emperors clearly stated that the Manichees, classified as *malefici*, were liable to the punishments already prescribed against the former. The rescript spells out these punishments in detail:

*Iubemus namque auctores quidem ac principes una cum abominandis scripturis eorum severiori poenae subici, ita ut flammeis ignibus exurantur: consentaneos vero et usque adeo contentiosos capite puniri praecipimus, et eorum bona fisco nostro vindicari sancimus*²³.

²⁰ «Imp. Diocletianus et Maximianus AA. et Constantius et Maximianus nobilissimi CC. Iuliano proconsuli Africae». The only extant text of this rescript is that given at *Collatio legum mosaicarum et romanarum* 15.3.1-8.

²¹ *Collatio* 15.3.1-4 (*Fontes iuris romani antiqui* [= *FIRA*], ed. C. G. Bruns and T. Mommsen, 7th ed., Tübingen, 1909 [reprint Aalen, 1969], II.580-581).

²² *Ibid.* 15.3.5 (= *FIRA* II.581).

²³ Section 6 of the rescript goes on to differentiate between punishments for *honestiores* and *humiliores*: the goods of the former are likewise to be forfeited to the Imperial treasury but their sentence is one of exile to the "Phaenensian or Proconnensian mines".

¹⁷ See for example Tertullian, *De praescr.* 43 (*Patrologia latina*, 2, c. 58) and *adv. Marc.* 1.18 (*Patrologia latina*, 2, c. 266). On astrology as a Christian heresy see L. Desanti, *Astrologi: eretici o pagani? Un problema esegetico*, in *Atti dell'Accademia romanistica costantiniana. X Convegno internazionale in onore di Arnaldo Biscardi*, Napoli, 1995, p. 691-692.

¹⁸ Alexander of Lycopolis, *Critique of the Doctrines of Manichaeus*, ch. I-II.

¹⁹ On the importance of this categorisation see the following discussion.

Pauli Sententiae 5.23 classifies *malefici* (*magi*) under the *Lex Cornelia de sicariis et veneficis* and states that they were liable to specific penalties:

Titulus XXIII. Ad legem Corneliam de sicariis et veneficis [...]. Magicae artis conscios summo supplicio adfici placuit, id est bestiis obici aut cruci suffigi. Ipsi autem magi vivi exuruntur. Libros magicae artis apud se neminem habere licet: et penes quoscumque reperti sint, bonis ademptis, ambustis his publice, in insulam deportantur, humiliores capite puniuntur²⁴.

Thus Diocletian's provisions for the burning of leading Manichees and their writings, the penalty of capital punishment for followers of Manichaean doctrines who are *humiliores* and the confiscation of goods to the Imperial fisc, all have direct precedents in the punishments against *magi* laid out in the *Pauli Sententiae*²⁵.

The rescript against the Manichees was reproduced in an edition of the *Codex Gregorianus*, a collection of Imperial rescripts under systematised titles, originally produced by the Diocletianic jurist Gregorius. The emperors' reference to Manichaeism *sub genere maleficiorum* no doubt prompted the revisionist to include the rescript under the title *de maleficis et Manichaeis*. The (unknown) compiler of the late fourth century *Collatio Legum Mosaicarum et Romanarum* cites the *Codex Gregorianus* as the source for his own reproduction of the Diocletianic text. However, in the *Collatio* the title under which the rescript is given was extended to include astrologers (*mathematici*): *Titulus XV, De mathematicis, maleficis et manichaeis*.

Some years before the 302 rescript against the Manichees the same emperors had issued an edict against the damnable art of *mathematici* (CI 9.18.2, 294). In fact bans against *magi* and *malefici* were traditionally linked by the Roman authorities with measures against *mathematici*: in 16 AD the Roman senate issued a comprehensive decree, exiling from Italy all astrologers, magicians and anyone who practised any form of divination²⁶. In book 7 of his handbook *On the Duties of the Proconsul* (213 AD) Ulpian laid out, for the first time in a systematic form, the various precedents relating to the legal standing of astrologers and other diviners *sub*

²⁴ *Pauli Sententiae* 5.23.17-18 (= *FIRA* II.409-410).

²⁵ The term *magus* (magician) was derived from Persian. Both astrology and magic were considered by the Romans to be Eastern in origin.

²⁶ Tacitus (*Ann.* 2, 32) names *mathematici*, *malefici* and *magi*, while Ulpian (*FIRA* II.579) mentions *mathematici*, *Chaldaei* and *arioli*. Dio 49.43.5 reports a similar ban issued by the aediles in 33 BC. Astrologers and magicians were subsequently banned from Italy under the Emperors Claudius, Vitellius, and Vespasian and possibly also under Nero and Domitian.

titulo de mathematicis et vaticinatoribus. Ulpian begins this title with the general observation:

Praeterea interdictum est mathematicorum callida inpostura et obstinata persuasione. Nec hodie primum interdici eis placuit, sed vetus haec prohibitio est.

Ulpian is aware that he is arguing out from specific precedents to produce a new general legal definition. It is this text which the author of the *Collatio* included under his own tripartite title *De mathematicis, maleficis et manichaeis*²⁷.

The author of the *Collatio* thus collected Ulpian's text against *mathematici* and the 302 anti-Manichee rescript under the same title (numbered as XV in the text). His purpose was a direct comparison between these Roman legal texts and a passage from Mosaic law, Deuteronomy XVIII.10-14:

Moses says: Let there not be found amongst you anyone who purges their son or daughter [by fire], nor a diviner with whom you cast lots; nor shall you countenance impostors who make poisons and say that as a result a woman has conceived, since these are seductive fables. Let there not be found amongst you an augur, nor an examiner of birds, nor a sorcerer (*maleficus*) or enchanter, nor one that has a snake in his stomach, nor a soothsayer (*haruspex*), nor an enquirer of the dead, nor a watcher of portents (*portenta inspiciens*). For all these things, as well as the doer of them, are condemned by the lord, your God²⁸.

By collecting together Roman legal prohibitions against *mathematici*, *malifici* and Manichees and then setting them side-by-side with the prohibitions of the Mosaic law, the author of the *Collatio* deliberately intended to highlight the agreement between the two legal systems²⁹. Modern scholars, without exception, treat the *Collatio legum mosaicarum et romanarum* as something of an eccentric anomaly. However, with respect to Title XV of the *Collatio*, the same mixing up of categories and appeals to both Roman legal and Christian theological contexts appears in the Theodosian Code.

Under the titles of the Theodosian Code itself legislative measures against the Manichees appear at 9.16, *De maleficis et*

²⁷ *Collatio* 15.2.1-6 (*FIRA* II.579-580).

²⁸ *Ibid.*, 15.1.1-3 (*FIRA* II.578-579).

²⁹ A (contemporary?) analogy can be found in the Ambrosiaster's citation of the 302 anti-Manichean rescript in his commentary on the letters of St Paul (*Comment. ad II ep. Tim.* III.6, *Patrologia latina*, 17, c. 521).

mathematicis et ceteris similibus, 16.5, *De haereticis* and 16.7, *De apostatis*. Manichaeism was classified as a Christian heresy; however its legal definition had been fused with that of *mathematici* and *malefici*. By 409 the *mathematici* themselves had moved into the Christian sphere:

Emperors Honorius and Theodosius Augustuses to Caecilianus, Praetorian Prefect.

We decree that *mathematici* shall be banished not only from the city of Rome but also from all the municipalities, unless, after the books of their false doctrine (*error*) have been consumed in flames under the eyes of the bishop, they are prepared to transfer their faith to the practice of the Catholic religion, and never return to their former false doctrine. But if they should not do this and, contrary to the salutary constitution of our clemency, should be apprehended in the municipalities or should introduce there the secrets of their false doctrine and profession they shall receive the punishment of deportation³⁰.

With regard to the Manichees *per se* the next legislative measure specifically issued against them, after the 302 rescript, was a constitution of the Emperors Valentinian and Valens, addressed to Ampelius, Prefect of the City and dated March 2, 372³¹. It is no coincidence that this constitution was promulgated at the height of Valentinian's infamous magic and treason trials³². From Valentinian onwards anti-Manichaean laws were regularly promulgated, each building upon the precedents already outlined above³³. In 425 the Emperor Theodosius could simply decree:

We command that the Manichaeans, heretics, schismatics, astrologers (*mathematici*) and every sect inimical to the Catholics shall be banished from the very sight of the City of Rome, in order that it may not be contaminated by the contagious presence of criminals³⁴.

³⁰ CTh 9.16.12 (409).

³¹ CTh 16.5.3 (372).

³² The actual charges involved were the use of *venena* (magic potions); *maleficium*, with the specific instruction of Valentinian (given in 370) to interpret accusations of magic as involving the additional offence of *maiestas imminuta*; illicit consultations with *mathematici*; and adultery.

³³ CTh 16.5.7 (381); 16.5.9 (382); 16.7.3 (May 21, 383); 16.5.11 (July 25, 383); 16.5.18 (389); 16.5.35 (399); 16.5.38 (405); 16.5.40 (Feb. 22, 407); 16.5.41 and 43 (Nov. 15, 407); 16.5.59 (423); 16.5.62 (425); and 16.5.65 (428). See also Nov. Val. 18 (445), prompted by Pope Leo's persecution of the Manichees and containing an oblique reference to Diocletian's anti-Manichaean law in its preamble.

³⁴ CTh 16.5.62 (July 17, 425), addressed to Faustus Prefect of the City. Sirm.6 (August 6, 425) extends the application of CTh 16.5.62 to the cities of Gaul: it reproduces the text of the latter with minor alterations and the addition of the

Between 372 and 425, however, the definition of Manichees as an outlawed sect underwent a further development: the classification of both existing and new heretical sects as crypto-manichaean.

In 381 a constitution was promulgated in the name of the Emperors Gratian, Valentinian and Theodosius which established new and severe penalties against convicted Manichees. The preamble to CTh 16.5.9 (382) specifies that Manichees are to be deprived "under the perpetual brand of just *infamia* of all right to make a will and to live under Roman law". Section 1 of the constitution gives "the general rule of this law" retroactive force and forbids Manichees from appealing to dilatory prescriptions in legal suits against them. This prohibition of one of the attempted defences which Manichees appealed to in court is coupled with a further measure in section 3 of the same constitution, which also seeks to ensure the application of the law against Manichees in concrete cases:

Nor shall they defend themselves with dishonest fraud under the pretence of those deceptive names by which many, as We have learned, wish to be called and signified as of approved faith and chaste character; especially since some of the aforesaid persons wish to be called the Encratites, the Apotactites, the Hydroparastatae, or the Saccophori, and by a variety of diverse names falsify, as it were, the ceremonies of their religious professions³⁵.

As Barone-Adesi has recently argued, the sects named here as crypto-manichaean were in fact all related to diverse manifestations of Christian ascetic practice³⁶. Thus this 381 constitution, intended to enable the prosecution of Manichees, had the incidental consequence of classifying certain types of Christian ascetics. The constitution itself concludes with the words: "For none of the aforesaid persons shall be protected by a profession of names but shall be held infamous and execrable because of the crimes of their sects". The Encratites, the Apotactites, the Hydroparastatae, and the Saccophori thus entered the legal arena – as heretical sects – in the context of Manichaeism.

A constitution issued by the same Emperors and dated almost exactly one year after CTh 16.5.7 elaborates on the definition of Encratites, Saccophori and Hydroparastatae as heretical sects in

sentence "Because of course it is unseemly that *religiosi* should be depraved by any *superstitiones* we command that the Manichaeans, heretics etc."

³⁵ CTh 16.5.7 (May 8, 381).

³⁶ G. Barone-Adesi, *Eresie "sociali" ed inquisizione Teodosiana*, in *Atti dell'Accademia romanistica costantiniana. VI Convegno internazionale*, [Perugia,] 1986, p. 119-166.

their own right³⁷. The preamble begins by outlawing Manichees who have chosen the life of hermits:

If any Manichaeon should flee the company of the good under the false pretence of the solitary life and should choose the secret gatherings of persons of the lowest classes, he shall be subjected to the law as a profaner and corrupter of Catholic discipline, which we all revere.

This particular type of Manichee is to

be intestable during his lifetime, while living he shall expend nothing on such outlawed persons, at his death he shall leave nothing to such unworthy persons and he shall restore all of his possessions to those persons who are *sui heredes*, not by character but by nature.

This sentence closes the preamble and section 1 of the constitution commences:

But those persons who are entitled Encratites, with a monstrous appellation, together with the Saccophori, and the Hydroparastatae, when they have been convicted in court, betrayed by crime, or discovered in a slight trace of this wickedness, We order to be afflicted with the supreme penalty and with inextinguishable punishment. With respect to their goods, the condition which we imposed on all this workshop (*officina*) from the inception of the law formerly issued, shall remain.

The Encratites, Saccophori and Hydroparastatae are thus clearly differentiated from the Manichaeon hermits, and are subjected to an altogether different scale of legal penalty: capital punishment. Section 1 closes with a series of detailed provisions for the actual prosecution of these sects:

Your sublimity (the Praetorian Prefect, Florus), therefore, shall appoint investigators, shall open court, and shall receive informers and denouncers, without the odium attached to informants.

This 382 constitution, with its references to heretical ascetic groups in the context of Manichaeism and capital punishment, provides an interesting analogy to the condemnation and execution of Priscillian of Avila and his followers, only four years later.

In 386 Priscillian appeared before the court of the Praetorian Prefect Evodius at Trier on the formal charge of *maleficium*, having been previously condemned by the Church Council of Saragossa (380) for heresy³⁸. Priscillian had himself appealed to the Emperor

³⁷ CTh 16.5.9 (March 31, 382).

³⁸ See H. Chadwick, *Priscillian of Avila: the Occult and the Charismatic in the Early Church*, Oxford, 1976, p. 111-148. For further discussion see G. Puglisi, *Giustizia criminale e persecuzioni antieretiche*, in *Sicilorum Gymnasium*, 43,

Maximus for cognition of his case as a means by which he could avoid an appearance at the planned ecclesiastical synod of Bordeaux. He was, however, followed to Trier by his principal Spanish accusers, the bishops Hydatius and Ithacius. Ithacius was appointed as prosecutor in the first trial of Priscillian before the Imperial court. At the Council of Saragossa Ithacius had explicitly linked Priscillian's teachings, and his particular brand of asceticism, with Manichaeism, astrology and the practice of magic arts. As I have argued above, the groundwork had already been laid in Roman law for linking Manichees, *mathematici* and *malefici*.

As a result of Ithacius' prosecuting strategy Priscillian confessed to an interest in magical studies, to having held nocturnal gatherings of women, and to having prayed naked. As Chadwick argues:

The juxtaposition of the charges was surely intended to insinuate the suggestion that, in what was believed to be Manichee fashion, these activities had gone on at one and the same time and place³⁹.

Ithacius' careful forensic framing of the case resulted in the prefect Evodius pronouncing Priscillian guilty of *maleficium*. After a retrial, in which bishop Ithacius was replaced as prosecutor by a professional advocate Patricius (*fisci patronus*), Priscillian was executed on the same charge of *maleficium*. The Emperor Maximus then sent tribunes to Spain to root out other "Priscillianists" by the application of the same charge.

Priscillian and his followers were pronounced guilty of *maleficium*, however the Emperor Maximus himself believed that they were Manichees. In a letter to Pope Siricius the Emperor states that "the Manichees were convicted not by circumstantial inferences nor by doubtful suspicions but by their own confession under judicial examination"⁴⁰. Maximus appended the *gesta* of Priscillian's trial for the Pope's own perusal. The heresiological rhetoric of later ecclesiastics placed Priscillianism within the Manichaeon sphere⁴¹.

1990, p. 96-108 and V. Burrus, *The Making of a Heretic: Gender, Authority and the Priscillianist Controversy*, Berkeley, 1995.

³⁹ H. Chadwick, *op. cit.*, p. 139.

⁴⁰ *Coll. Avel. 40 (Epistulae imperatorum... Avellana quae dicitur collectio*, ed. O. Günther, Vienna, 1895 [*Corpus scriptorum ecclesiasticorum latinorum* (= CSEL), 35-1], p. 91, l. 22-24).

⁴¹ For example Filastrius, *Diversarum hereseon liber* 84 (Filastrius Brixienensis, *Diversarum hereseon liber*, ed. F. Heylen, Turnhout, 1957 [*Corpus christianorum. Series latina* [= CCL], 9], p. 253-254); Augustine, *De Haeres. 70*, ed. R. Vander Plaetse and C. Beukers, Turnhout, 1969 (CCL, 46), p. 333-334 and *Ad Orosium contra Priscillianistas et Origenistas*, ed. K. D. Daur, Turnhout, 1985 (CCL, 49), p. 165-178; and Jerome, *Ep. 133.4 (S. Eusebii Hieronymi opera. 3. Epistulae 121-154*, ed. J. Hilberg, Vienna, 1918 (CSEL, 56), p. 247-248).

Pope Leo the Great, however, was an exception. In his *Ep.* 15 (dated 447) he outlined the *impietas* of the Priscillianists:

... quae non contenta eorum recipere falsitates qui ab Evangelio sub Christi nomine deviarunt, tenebris se etiam paganitatis immersit, ut per magicarum artium profana secreta et mathematicorum vana mendacia, religionis fidem morumque rationem in potestate daemonum, et in effectum siderum collocarent⁴².

For Leo, Priscillianists were direct heirs to the teachings of *magi* and *mathematici*.

A further example of the adherents of a heretical sect being charged with *maleficium* is provided by CTh 16.5.34, issued by Arcadius and Honorius to the Praetorian Prefect Eutychianus and dated March 4, 398. The constitution is directed against the clerics of the Eunomian and Montanist *superstitiones*. Section 1 states that *codices* containing Eunomian or Montanist doctrine should be sought out, produced and then "consumed with fire immediately under the supervision of the *iudices*". A comparison between this instruction and CTh 9.16.12 (409) clearly reveals the intertwining of ecclesiastical and secular judicial authorities. The *codices* of heretics are to be burned before Imperial magistrates, the *codices* of *mathematici* are to be burned before the bishop. Section 1 of CTh 16.5.34 continues:

If perchance any person should be convicted of having hidden any of these books under any pretext or fraud whatever and of having failed to deliver them, he shall know that he himself shall suffer capital punishment, as a retainer of noxious books and writings and as guilty of the crime of *maleficium*.

In the case of the Eunomians – who were condemned as Christological heretics for their extreme form of Arianism – the charge of *maleficium* certainly did not fit their proper crime. By the end of the fourth century the charge of *maleficium* had become a convenient category under which crimes relating to heresy could be subsumed.

In 428 the Emperors Theodosius II and Valentinian attempted to systematise the prosecution of heretics by producing an edict which laid down a hierarchy of named heretical sects⁴³. The Emperors acknowledge that "not all should be punished with the same severity". Firstly the constitution groups together the Arians,

⁴² Pope Leo, *Ep.* 15 pr. (*Patrologia latina*, 54, c. 679A).

⁴³ CTh 16.5.65,2 (May 30, 428) addressed to Florentinus Praetorian Prefect. It should be noted that this systematising edict, intended to clarify the confusion of existing anti-heretical legislation, was promulgated only nine months before the first project for compiling a Theodosian legal code was announced.

Macedonians and Apollinarians "whose crime it is to be deceived by harmful meditation and to believe lies about the fountain of truth": they are prohibited from having churches within any municipality. Secondly, the Novatians (a heretical sect but in origin a schism) and Sabbatians (an offshoot of the Novatians) are prohibited from constructing any new churches. Thirdly, the constitution forbids the right of assembly and prayer to a bewildering array of sixteen heretical sects: Eunomians, Valentinians, Montanists or Priscillianists, Phrygians, Marcianists, Borborians, Messalians, Euchites or Enthusiasts, Donatists, Audians, Hydroparastatae, Tascodrogitae, Photinians, Paulians, Marcellians and finally "those who have arrived at the lowest depth of wickedness, namely the Manichaeans". In fact the Manichaeans also form a fourth sub-category: they shall be expelled from the municipalities, so that no opportunity shall be left to them to work their *maleficium* on the elements themselves⁴⁴. By concluding their list with a reference to the employment of magic arts, the Emperors ended where the theologians' lists of heretics began.

The New Testament text of Acts 8.9-25 relates the confrontation between the Apostle Peter and Simon *Magus*, a practitioner of sorcery and adept of magical arts. Ecclesiastical heretical lists, from Irenaeus of Lyons to Vincent of Lérins, present Simon Magus as the spiritual Father of all heresy⁴⁵. Hippolytus and Vincent of Lérins, in particular, state that all subsequent heretics either spiritually derive indirectly from Simon Magus or are his direct successors. In terms of doctrinal genealogies the orthodoxy of apostolic succession (with Peter as its founder) is mirrored by the heresy of a pseudo-apostolic succession (with Simon Magus as the heresiarch). In CTh 6.5.66 (435) Theodosius II appealed to this heresiological rhetoric in naming the heresy of Nestorius, Patriarch of Constantinople until his deposition in 431, after Simon Magus himself:

⁴⁴ Compare CTh 9.16.5 (357): "Many persons who dare to disturb the elements by magic arts do not hesitate to jeopardise the lives of innocent persons... A deadly curse shall annihilate such persons, since they are foreign to nature".

⁴⁵ Irenaeus, *Contra haereses* 1.23,1 (ed. A. Rousseau and L. Doutreleau, Paris, 1979 [*Sources chrétiennes*, 264], p. 312-313); Hippolytus, *Refutatio omnium haeresium* 6.7 (*Hippolytus Werke. III. Refutatio omnium haeresium*, ed. P. Wendland, Leipzig, 1916 [*Die griechischen christlichen Schriftsteller der ersten drei Jahrhunderte*, 26], p. 134-135); Ps.-Tertullian, *Adversus omnes haereses*, ed. A. Gerlo et al., Turnhout, 1954 (CCL, 2), p. 1401; and Vincent of Lérins, *Commonitorium* (ed. R. Demeulenaere, Turnhout, 1985 (CCL, 64), 181). For other examples from patristic literature see A. Le Boulluc, *La notion d'hérésie dans la littérature grecque II-III^e siècles. II. Clément d'Alexandrie et Origène*, Paris, 1985 (*Collection des études augustinienes*, 111), p. 481-483 and 558.

Nestorius, the author of a monstrous *superstitio*, shall be condemned and his followers shall be branded with the mark of an appropriate name, so that they may not use the name of Christians [...]; adherents of the nefarious sect of Nestorius shall everywhere be called Simonians, in order that they may appear rightly to have received the name of him whose crime they have imitated in deserting God⁴⁶.

In a flourish of theologically inspired rhetoric, the Emperor linked the doctrinal innovations of Nestorius to Simon the magician. Nestorius had threatened the Catholic church as Simon Magus had threatened the authority of the Apostles. But Nestorius, like Simon before him, had been vanquished by representatives of the "venerable sect of the orthodox": he had been deposed and excommunicated at the 431 Council of Ephesus. This synod was in fact an oecumenical council of the Church. As an oecumenical assembly of bishops it could define orthodoxy in the true sense of the word. Naming and classifying heretics was one strategy which could be adopted in the legal prohibition of heretical beliefs, but the Imperial legislators could also attack the problem of heretical belief from the other way round. They could define in what and with whom orthodox doctrine itself lay.

HOW TO PROSECUTE A HERETIC: THE LEGAL DEFINITION OF ORTHODOX BELIEF

In 377 a constitution was issued in the names of the emperors Valens, Gratian and Valentinian which prohibited the repetition of the sacrament of baptism (CTh 16.6.2). The practice of repeating baptism was defined as false doctrine, threatening the preservation of the "Apostolic faith":

The teachings, indeed, of those persons who have approved the Apostolic faith without any change of baptism shall be followed. For it is Our will that nothing shall be taught except what the uncorrupted faith and tradition of the Evangelists and Apostles have preserved, just as the Imperial law of Our Fathers, Constantine, Constantius and Valentinian have decreed⁴⁷.

⁴⁶ CTh 16.5.66, pr. Section 2 of the constitution specifically orders "Moreover, no person shall refer to such heretics by any other than the aforesaid name in religious disputation". Augustine, *Contra Iul. Opus Imp.* 1.71 rather sardonically refers to the creation of new sectarian names by theologians.

⁴⁷ CTh 16.6.2 pr (October 17, 377). The Constantinian legislation included in the Theodosian Code uses the phrase *catholica lex* to exclude heretics and schismatics (see for example CTh 16.5.1 dated September 1, 326).

In defining right belief as the "uncorrupted faith and tradition of the Evangelists and Apostles" the emperors appealed to the legislative precedents of their predecessors. However, establishing as orthodox "those persons who have approved the Apostolic faith without any change of baptism" was of limited definitional value, except in respect to excluding those who practised rebaptism. Under the rubric of CTh 16.6.2 all the parties to the great Trinitarian disputes of the mid-fourth century could be admitted as orthodox⁴⁸. The constitution itself may well have been deliberately phrased to avoid any appeals to its content by the various Arian or non-Arian parties. If, as Mommsen argued, the constitution is to be attributed to Valens, its appeal to "the uncorrupted faith and tradition of the Evangelists and Apostles" sits comfortably with his policy of adhering to the imprecise and comprehensive Trinitarian formula that the Son is like the Father as the scriptures teach – ratified by the 360 church synod at Constantinople. In fact the doctrinal affirmations, expressed as baptismal creeds, agreed by Church Councils from Nicaea in 325 until Constantinople in 381, can all be viewed as formulae inspired by the spirit of conciliation. By 380, however, both the political and ecclesiastical situation had changed. A new legislative strategy was needed if a more 'exclusive' orthodoxy was to be enforced.

The oecumenical councils of the ancient Church were formally assembled on the initiative of the Emperor. Moreover, Imperial ratification of conciliar decisions was crucial in establishing the authority of those ecclesiastical assemblies. Accordingly, the Nicene creed – agreed at the first oecumenical council of the Church in 325 – had been ratified by the Emperor Constantine. The Nicene creed laid down the precise formulation that the Son is identical in *ousia* with the Father, derived from the Father's *ousia* – the anathema appended to it condemned the (alleged) proposition of Arius' that the Son is of a distinct *hypostasis* or *ousia*. The creed was carefully formulated to be as inclusive as possible. As such, the hair-splitting Trinitarian disputes which followed all revolved around the question of whether the wording of the Nicene creed itself was sufficient to repel heresies. When the Emperor Gratian requested that Ambrose compose him a treatise in proof of the divinity of Christ, Ambrose replied with the first two books of the *De Fide* (378), containing an eloquent exposition of the Nicene Creed as excluding all

⁴⁸ For a precise, but concise, description of the early and mid-fourth century Christological disputes see H. Chadwick, *Orthodoxy and heresy from the death of Constantine to the eve of the first Council of Ephesus*, in *The Cambridge Ancient History*. 13, *The Late Empire A.D. 337-425*, Cambridge, 1998, p. 562-580.

contemporary deviators from the Faith. However, for Ambrose, a hard-line anti-Arian, the Nicene creed was exclusive – not inclusive:

Of the Acts of the councils I shall let that one be my chief guide by which three hundred and eighteen priests [...] made a trophy raised to proclaim their victory over the infidel throughout the world, prevailing by that courage of the faith, in which all agreed. Now theirs is the declaration of our faith, that we say that God is One, neither dividing His Son from Him, as do the pagans, nor denying, with the Jews, that He was begotten of the Father before all worlds, and afterwards born of the Virgin; and not, like Sabellius, confounding the Father with the Word, and so maintaining that Father and Son are one and the same person; nor again, like Photinus, holding that the Son first came into existence in the Virgin's womb; nor believing with Arius in a number of diverse powers, and so like the pagan making out more than One God⁴⁹.

Furthermore, Ambrose provided Gratian with a handy means of identifying heretics: "Indeed many are the names, but it is one error, the impious all agree, they are in communion in their discord for Catholicism". Ambrose thus presented Gratian with an account of his faith – and the Nicene creed itself – as the only unified theological position.

The 380 Edict of Thessalonica (CTh 16.1.2) issued in the name of the emperors Gratian, Valentinian and Theodosius, but in reality attributable to Theodosius himself, firmly tied "apostolic discipline" and "evangelical doctrine" to the Nicene creed. However, Theodosius also adopted the further crucial strategy of specifying individual bishops as representatives of orthodox belief. If Theodosius had simply restated the Nicene creed, the way would have remained open to disputation as to its exact meaning. By appealing to the criterion of communion with the personal faith of named individuals the emperor could enforce the *right* interpretation of the Nicene creed:

It is Our will that all the peoples who are ruled by the administration of Our Clemency shall practise that religion which the divine Peter the Apostle transmitted to the Romans, as the religion which he introduced makes clear even unto this day. It is evident that this is the religion that is followed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of Apostolic sanctity; that is, according to the apostolic discipline and the evangelic doctrine, we shall believe in the single Deity of the Father, the Son and the Holy Spirit, under the concept of equal majesty and of the Holy Trinity⁵⁰.

⁴⁹ Ambrose, *De fide* 1.5-6.

⁵⁰ CTh 16.1.2pr (February 28, 380), addressed *ad populum urbis Constantinopolitanae*.

Section 1 of the constitution continues:

We command that those persons who follow this rule (*lex*) shall embrace the name of Catholic Christians. The rest, however, whom We adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of our own initiative, which We shall assume in accordance with the divine judgement.

Thus the preamble to the edict defines the *lex Christiana*: section 1 decrees that those who adhere to this *lex* take the *nomen* of *Christiani catholici*; and the *reliqui* who remain are to be considered *dementes vesanique*. Disputes as to the doctrinal content of the *lex Christiana* are to be silenced, as the criteria of communion with Pope Damasus and Peter of Alexandria is part of that *lex* itself.

CTh 16.1.3 (July 30, 381), issued as the Emperor Theodosius' response to the oecumenical Council of Constantinople (May 381), also begins with an affirmation of the Nicene creed but is more precise in its formulation of the *communio sanctorum*. Theodosius orders that all churches are immediately to be surrendered:

... to those bishops who appear to have been associated in the communion of Nectarius, bishop of the church of Constantinople, and of Timotheus, Bishop of the city of Alexandria in Egypt; to those bishops also who, in the regions of the Orient, appear to be communicants with Pelagius, Bishop of Laodicea, and with Diodorus, Bishop of Tarsus; also in the Proconsular Province of Asia and in the Diocese of Asia, with Amphilocius, Bishop of Iconium, and with Optimus, Bishop of Antioch; in the Diocese of Pontus, with Helladius, Bishop of Caesarea and with Otreius of Melitene, and with Gregorius, Bishop of Nyssa; with Terennius, Bishop of Scythia, and with Marmaris, Bishop of Martianopolis. Those bishops who are of the communion and fellowship of such acceptable priests must be permitted to obtain the Catholic churches. All, however, who dissent from the communion of those who have been expressly mentioned in this special enumeration shall be expelled from their churches as manifest heretics and hereafter shall be altogether denied the right and power to obtain churches, in order that the priesthood of the true Nicene faith may remain pure, and after the clear regulations of Our law, there shall be no opportunity for malicious subtlety.

Taken in conjunction with the edict of Thessalonica, this law is considered by modern scholars to have settled the legal definition of orthodox belief. However, as I have argued above, blanket legislation had to be applied to particular instances. Theodosius' legislation had to be played out in actual disputes and within the courtroom there was plenty of scope for "subtlety".

The Imperial legislation issued after 381 amply demonstrates that the importance of the Theodosian settlement should not be overestimated. The example of CTh 16.5.16 (issued by Theodosius at Constantinople on August 9, 387) is instructive. The constitution reads:

We have learned that some of the Arians cite as their defence a general rule of Our regulations to the effect that they are permitted to usurp those practices which appear to them to suit their advantage. That rule (*lex*) shall be abrogated, and they shall know that no such order has emanated from our Imperial consistory. If anything, therefore, should be cited by them for their own advantage, and if anyone should henceforth circulate such pseudo-regulations, he shall be held guilty of forgery.

The phrasing of the constitution suggests that certain Arians had indeed practised "malicious subtlety" in the courtroom, in their attempts to circumvent Theodosius' anti-Arian legislation of 380 and 381. However, the reality is more complex.

The *lex* which the Arians relied on in 387 had in fact been promulgated by Theodosius' colleague, Valentinian, on January 23, 386. Valentinian deliberately attacked Theodosius' definition of orthodoxy, granting the right of assembly "to those persons who believe according to the doctrines which in the times of Constantius of sainted memory were decreed as those that would endure forever"⁵¹. Moreover, Valentinian cites as licit the faith agreed upon at the 'Arian' council of Ariminum (359). Valentinian thus establishes an *inclusive* definition of orthodoxy:

The right of voluntary assembly shall also be open to those persons for whom We have so ordered. If those persons who suppose that the right of assembly has been granted to them alone should attempt to provoke any agitation against the regulation of Our Tranquillity, they shall know that, as authors of sedition and disturbers of the peace of the Church, they shall also pay the penalty of high treason with their life and blood. Punishment shall no less await those persons who may attempt to suplicate Us surreptitiously and secretly, contrary to this Our regulation.

In seeking the application of Valentinian's edict the Arians were not appealing to "malicious subtleties", but rather exploiting the conflicting religious policies of two contemporary emperors⁵². An

⁵¹ CTh 16.1.4 (excerpted at CTh 16.4.1 under the rubric *de his qui super religione contendunt*).

⁵² A further striking example of different Imperial religious policies after 381 is provided by constitutions relating to the heresy of the Eunomians, whose rallying cry was that the Word is different (*anomoios*) from the Father. CTh 16.5.6 (381) refers to the "crime of the Eunomian perfidy"; 16.5.17 (May 4, 389)

analogous, if more devious, strategy was applied by the North African Donatists in citing a rescript, obtained from the pagan Emperor Julian (360-363), as proof of their orthodoxy in concrete legal cases up to at least 405⁵³. Legal definitions of orthodox belief also had their limitations.

* * *

The innovative introduction of the idea of wrong belief into the Roman legislative sphere necessitated the legal categorisation and systematisation of religious belief itself. Heretics had to be grouped and named if they were to be prosecuted. Definitions were thus elaborated case by case, as new heresies were identified and classified within the ecclesiastical sphere. These definitions were then tested through their application in concrete legal cases.

Behind the laws contained in the Theodosian Code lies the history of a skilled community of forensic practitioners, both secular and ecclesiastical, attempting to implement, extend or evade the legislation through the exercise of their forensic education. Within the courtroom doctrinal issues became crystallised. Individuals accused of heresy were called upon to justify their theological positions. Christian doctrine was expounded, tested and stretched. Moreover, the final judgment of the case provided a legal resolution which could then be appealed to in future doctrinal disputes. In this way, forensic argumentation reveals itself as an important mechanism through which the demand for a single Christian orthodoxy could be satisfied.

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lays down heavy penalties against the Eunomians and states that they "shall have nothing in common with the rest of mankind"; 16.5.23 (June 20, 394) abrogates the former and returns the Eunomians to communion with the common law; 16.5.25 (March 13, 395) revokes the law of 394 and reinstates all previous decrees against the Eunomians; 16.5.27 (December 25, 395) revokes 16.5.25 after only nine months and rehabilitates the Eunomians; after only four months this law is abrogated by 16.5.31-32 (April 21 or 22, 396); on March 4, 398 anyone in possession of Eunomian *codices* is declared guilty of *maleficium* (16.5.34). Cf. the subsequent legislation at 16.5.36 (399); 16.5.49 (410); 16.5.58 (415); and 16.5.60 (423).

⁵³ See CTh 16.5.37 (dated February 25, 405).